

1 The Honorable Richard A. Jones  
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1 2011 Amendment that ended the “kicker” that would have reverted denied attorneys’ fees to the  
 2 defendant. *Cf. In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). As a  
 3 result, the settlement now consists of a common fund of \$3.55 million instead of \$52,000 for the  
 4 class.

5       2. It is appropriate to give joint credit to the class counsel and the objectors for this  
 6 \$3.5 million difference. *In re Prudential Ins. Co. of Am.*, 273 F. Supp. 2d 563, 572 (D.N.J. 2003),  
 7 *aff’d* 103 Fed. Appx. 695, 697 (3rd Cir. 2004) (awarding objector 1.4% of class counsel’s fee  
 8 award for objection that was responsible for 1.4% of class recovery); *Larson v. Sprint Nextel*  
 9 *Corp.*, 2010 WL 234934 at \*28 (D.N.J. Jan 15, 2010) (awarding objectors’ attorneys 4.4% of  
 10 attorneys’ fee award for providing 4.4% of total class benefit). *See also Lan v. Ludrof*, 2008 WL  
 11 763763 at \*28 (W.D. Pa. Mar 21, 2008) (awarding objector 25% of the increase in the benefit to  
 12 the class); *Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987) (court awarded 10% of the  
 13 total fund to objectors’ counsel).

14       3. The Ninth Circuit has a 25% benchmark for attorneys’ fees in class action  
 15 settlements. *Bluetooth, supra*. Under normal circumstances, it would be appropriate to award  
 16 \$875,000 to class counsel, and instruct class counsel to distribute \$175,000 of that award to  
 17 counsel for Langone and \$175,000 to counsel for Krauss, reflecting the objectors substantial  
 18 contribution in turning a settlement that provided \$52,000 in cash to the class into a settlement that  
 19 provided \$.

20       4. However, there are two unusual circumstances in this case. *First*, Krauss has not  
 21 requested fees and instead asks that his \$175,000 share, reflecting a 5% percentage of the benefit  
 22 created, be distributed to the class. The Court grants that request.

23       5. *Second*, class counsel has taken the position that the decision *In re Mercury*  
 24 *Interactive Sec. Litig.*, 618 F. 3d 988 (9th Cir. 2010), required the objectors, and anyone seeking  
 25 fees from the class, to provide extensive documentation of the structure of their firms, contracts  
 26 with their attorneys, their attorneys’ contracts with their employers, and portfolio composition.

ORDER REGARDING STATEMENT RE FEE  
 REQUEST - 2  
 CASE NO. C09-00045-RAJ

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1 This Court is skeptical that such materials are relevant to a fee request; indeed, class counsel did  
 2 not disclose any of this information to the class in their fee request. Moreover, *Mercury*  
 3 *Interactive*, on its face, applies only to class counsel fees; not only is that consistent with the plain  
 4 language of FRCP 23(h), but *Mercury Interactive* bases the need for disclosure to the class on the  
 5 conflict of interest between the class and the class's attorneys in a fee request, and no such conflict  
 6 exists when an objector seeks fees. 618 F.3d at 993-95.

7       6.     However, it is unquestionably the case that class counsel has benefited from that  
 8 position by coercing Krauss to withdraw his fee request rather than comply with a burdensome  
 9 subpoena. Class counsel is thus judicially estopped from claiming that they have complied with  
 10 the minimum requirements of Rule 23(h) and *Mercury Interactive*. A party is not permitted to  
 11 benefit from a legal position in one part of the case, and then deny its effect in another part of the  
 12 same case. *New Hampshire vs. Maine*, 532 U.S. 742 (2001). I therefore find that class counsel has  
 13 waived their right to seek fees.

14       7.     The Court, however, has the power of equity to do complete justice and  
 15 nevertheless award fees. *Northwest Environmental Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d  
 16 668, 680 (9th Cir. 2007); *Reebok Int'l, Ltd. v. Marnatech Ent., Inc.*, 970 F.2d 552, 561-62 (9th Cir.  
 17 1992). Class counsel is entitled to some recovery for the benefit created, though I will exercise my  
 18 discretion to reduce their fee request in light of their abusive conduct in this case and their  
 19 multiple attempts to impose unfair settlements upon the class.

20       THEREFORE, the Court hereby ORDERS, ADJUDGES AND DECREES that Langone's  
 21 and Krauss's Motions for Fees are hereby GRANTED, and Class Counsel's Motion for Fees is  
 22 hereby DENIED. Class Counsel shall be awarded \$525,000 in attorneys' fees. Langone is entitled  
 23 to \$175,000 in attorneys' fees, to be paid by Class Counsel.

1 IT IS SO ORDERED.  
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DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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THE HONORABLE RICHARD A. JONES  
UNITED STATES DISTRICT COURT JUDGE

6 *Presented by:*  
7  
8

/s/ Daniel Greenberg

Daniel Greenberg (*pro hac vice*)

**CENTER FOR CLASS ACTION FAIRNESS LLC  
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/s/ Theodore H. Frank

Theodore H. Frank (*pro hac vice*)

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ORDER REGARDING STATEMENT RE FEE  
REQUEST - 4  
CASE NO. C09-00045-RAJ

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 13th day of January, 2012.

/s/

Marcia A. Ripley

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**ORDER REGARDING STATEMENT RE FEE  
REQUEST - 5  
CASE NO. C09-00045-RAJ**

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